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FM SECSTATE WASHDC

TO AMEMBASSY MANILA

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CNO

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E.O. 11652: GDS

TAGS: MARR, US, RP

SUBJECT: MBA NEGOTIATIONS -- ARTICLE XIII:INTER SE OFFENSES

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CINCPAC ALSO FOR POLAD

1. ALTHOUGH THERE APPEAR TO BE NO IMMEDIATE PROSPECTS FOR RESUMPTION OF TECHNICAL PANEL TALKS ON CRIMINAL JURISDICTION ISSUES, WE WISH TO CLARIFY STATE/DOD VIEW ON INTER SE. FOLLOWING COMMENTS ARE PROVIDED ON MATTERS RAISED IN REFTEL A.

2. AS WE UNDERSTAND THE SITUATION, THERE ARE TWO BASIC AND INDEPENDENT AREAS OF DISAGREEMENT BETWEEN THE USG AND GOP ON INTER SE ISSUES. THE FIRST OF THESE IS THAT THE GOP SEEKS US CONCESSIONS WITH RESPECT TO JURISDICTION OVER INTER SE OFFENSES AGAINST PHIL CITIZEN DEPENDENTS WHO ARE NOT US CITIZENS. THE SECOND, WHICH WE UNDERSTAND WAS NOT FORMALLY RAISED BY PHIL PANEL DURING 1970-71 TECHNICAL LEVEL TALKS, IS THAT THE PHILIPPINE JUSTICE DEPARTMENT HAS EXPRESSED THE VIEW THAT INTER SE CRIMES MUST BE DEFINED IN TERMS OF THE PHILIPPINE CRIMINAL CODE.

WE FURTHER UNDERSTAND THAT BOTH US AND PHIL PANELS RECOGNIZE POSSIBILITY OF TRADE-OFF IN FINAL ROUND OF TALKS BY USG CONCESSION WITH REGARD TO INTER SE OFFENSES AGAINST PHIL CITIZEN DEPENDENTS IN EXCHANGE FOR GOP CONCESSION ON DUTY CERTIFICATES AND AGREEMENT ON OTHER PROVISIONS OF ARTICLE XIII AS PRESENTLY DRAFTED. THIS WOULD RESOLVE FIRST AREA OF DISAGREEMENT, BUT PROBLEM OF PHIL DEFINITION OF INTER SE CRIMES WOULD LARGELY REMAIN.

3. WHILE DEPARTMENT AND DOD APPRECIATE EMBASSY DESIRE TO RESOLVE LATTER PROBLEM, EXCHANGE OF NOTES PROPOSED REFTEL A GIVES US SOME DIFFICULTIES. THE DEFINITION OF INTER SE CRIMES AS THOSE IN WHICH THE "VICTIM OF THE OFFENSE IS A MEMBER OF THE US ARMED FORCES, CIVILIAN COMPONENT OR A DEPENDENT" COULD RAISE NEW QUESTIONS OF INTERPRETATION, SUCH AS WHETHER EVERY CRIME HAS A VICTIM

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AND IF SO, WHO IS THE VICTIM (E.G., CONSIDER IN THIS LIGHT OUR EFFORTS IN REFTELS A AND B TO IDENTIFY PERPETRATORS AND VICTIMS IN ADULTERY AND CONCUBINAGE CASES). SIMILAR INTERPRETATIVE PROBLEMS WOULD LIKELY ARISE IN ANY ATTEMPT TO DEFINE DIRECTLY INTER SE OFFENSES

IN EXCHANGES OF NOTES. OBVIOUSLY, US AND PHILS MAY DIFFER ON THESE QUESTIONS, AND DEBATE EVEN COULD RETURN

TO SAME ARGUMENTS ABOUT PHIL CRIMINAL CODE WHICH WE
NOW ENCOUNTER.

4. WE ARE INCLINED TO BELIEVE THAT WE SHOULD AVOID
DISCUSSING THE DEFINITIONAL PROBLEM UNTIL NEGOTIATIONS
ON OTHER CRIMINAL JURISDICTION POSITIONS OF THE TWO
SIDES ARE MORE FULLY DEVELOPED. IF WE WERE TO RAISE
THE ISSUE AT THIS STAGE, HE FORESEE POSSIBILITY THAT
VIEW NOW MAINTAINED BY PHIL SECRETARY OF JUSTICE MIGHT
BECOME FIRM GOP NEGOTIATING POSITION. FURTHERMORE,
DISCUSSION OF INTER SE ISSUES COULD QUICKLY BECOME
BOGGED DOWN TO THE DETRIMENT OF NEGOTIATION OF ANY TRADE-
OFF BETWEEN FUNDAMENTAL USG INTERESTS IN DUTY CERTIFICATES
AND PHIL DESIRE FOR CONCESSIONS ON INTER SE CRIMES
DIRECTED AGAINST PHIL CITIZEN DEPENDENTS. IF POSSIBLE,
WE WOULD PREFER TO DEAL WITH THE PROBLEMS CREATED BY
PHIL RELIANCE ON ITS CR MINAL CODE IN FINAL ROUNDS OF
NEGOTIATION AND IN A MORE INDIRECT MANNER. (FYI. ONE
POSSIBLE RESOLUTION, FOR EXAMPLE, MIGHT BE FOR USG
CONCESSIONS WITH RESPECT TO JURISDICTION OVER CRIMES
DIRECTED AGAINST PHIL CITIZENS TO TAKE THE FORM OF AN
EXCHANGE OF NOTES. SUCH NOTES MIGHT BE JUDICIOUSLY
PHRASED SO AS TO MAKE CLEAR THAT PHIL CRIMINAL CODE

CATEGORIES DO NOT CONTROL INTER SE DEFINITION. END FYI.)
WE RECOGNIZE, OF COURSE, THAT PHILS MIGHT INITIATE
DISCUSSION OF THIS ISSUE THEMSELVES, BUT EVEN IN THAT CASE
WE WOULD SUGGEST DEFERRAL OF DISCUSSIONS UNTIL FINAL
ROUNDS, UNLESS PHIL PANEL SHOWED WILLINGNESS TO YIELD
QUICKLY ON THIS POINT.

5. UNTIL SUCH TIME AS TECHNICAL PANELS RESUME, WE
BELIVE US PANEL IN CJIC HAS OPPORTUNITY TO CREATE
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FAVORABLE CLIMATE FOR EVENTUAL RESOLUTION OF INTER SE
ISSUES BY ADOPTING A FORTHCOMING ATTITUDE WITH RESPECT
TO ADULTERY AND CONCUBINAGE CASES. WE APPRECIATE
EMBASSY'S DETAILED REVIEW OF PREVIOUS CONCUBINAGE CASES,

BUT DEPARTMENT AND DOD REMAIN DOUBTFUL THAT SUCH OFFENSES
ARE ,SOLELY AGAINST THE PERSONS OR PROPERTY, OF THE
DEPENDENT WIFE. IN MANY FACTUAL SITUATIONS IT WOULD
BE ARGUABLE THAT CONCUBINAGE IS AN OFFENSE WITHIN THE
EXCLUSIVE JURISDICTION OF THE GOP. CONVERSELY, IF IN
ORDER TO CLAIM CONCURRENT JURISDICTION, US MILITARY
AUTHORITIES TAKE POSITION THAT THE OFFENSE IS SUFFICIENTLY
SIMILAR TO OFFENSES PUNISHABLE UNDER THE UCMJ, SUCH AS
ADULTERY, WE WOULD BE FACED WITH THE PROBLEM OF TAKING
APPROPRIATE ACTION IN SUCH CASES. EXPERIENCE HAS SHOWN

THAT THE COURT-MARTIAL AND FOREIGN CLAIMS SYSTEM ARE NOT WELL SUITED TO RESOLVE ESSENTIALLY DOMESTIC DISPUTES, AND WE WOULD BE RELUCTANT TO CLAIM JURISDICTION IN A CLASS OF CASES WHERE WE HAVE NO INTENTION OF EXERCISING IT.

6. THUS WE BELIEVE THAT WE CAN BE MORE FLEXIBLE IN PERMITTING THE PHILIPPINES TO EXERCISE JURISDICTION IN ADULTERY AND CONCUBINAGE CASES, WITHOUT CONCEDED PHIL DEFINITION OF INTER SE CRIMES. AS THIS CLASS OF CASES APPEARS TO BE THE PRINCIPAL PRACTICAL SOURCE OF FRICTION WHICH HAS OCCASIONED PHIL RELIANCE ON THEIR CRIMINAL CODE CATEGORIES, WE ARE HOPEFUL THAT A MORE FORTHCOMING ATTITUDE MIGHT HELP SOFTEN THE PHIL POSITION NOT ONLY ON THE DEFINITION OF INTER SE CRIMES BUT ALSO ON THE QUESTION OF JURISDICTION OVER CRIMES AGAINST PHIL CITIZEN DEPENDENTS. FOR THE PRESENT, WE ARE NOT PREPARED TO AUTHORIZE ANY NEW PROPOSALS REGARDING EITHER AMENDING THE INTER SE PROVISIONS OF THE MBA OR PROVIDING FOR AN EXPLANATORY EXCHANGE OF NOTES. KISSINGER

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